



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038-AE00

Swap Dealers and Major Swap Participants; Clerical or Ministerial Employees

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission is adopting an amendment to its regulations to clarify certain responsibilities of a swap dealer or major swap participant regarding its employees who solicit, accept or effect swaps in a clerical or ministerial capacity.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Introduction

A. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹ was signed into law July 21, 2010. The Dodd-Frank Act amended the Commodity Exchange Act (CEA or Act)² to require the registration of swap dealers (SDs) and major swap participants (MSPs), and to establish a comprehensive new regulatory framework for swaps. One such amendment was new CEA section 4s(b)(6), which states that except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or a major swap participant to permit any person associated with a swap dealer or a major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification (“Prohibition”).

A related amendment that the Dodd-Frank Act made was to add a definition of “associated person of a swap dealer or major swap participant” in new CEA section 1a(4), which provides that the term “associated person of a swap dealer or major swap participant” means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves: (i) the solicitation or acceptance of swaps; or (ii) the supervision of any person or persons so engaged. The

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act can be accessed through the Commission’s Web site, <http://www.cftc.gov>.

² 7 U.S.C. 1 *et seq.* The CEA also can be accessed through the Commission’s Web site.

definition contains an exclusion, however, stating that other than for purposes of CEA section 4s(b)(6), the term “associated person of a swap dealer or major swap participant” does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

Thus, except to the extent that the Commodity Futures Trading Commission (Commission or CFTC) specifically provided by rule, regulation, or order, an SD or MSP would be subject to the prohibition against permitting a person associated with the SD or MSP (including a person employed in a clerical or ministerial capacity) to effect or be involved in effecting swaps if the associated person were subject to a statutory disqualification.

On January 19, 2012, the Commission published in the Federal Register regulations that provide for the registration of SDs and MSPs.³ Among these new regulations were Regulation 1.3(aa)(6),⁴ which amended the existing definition of “associated person” in the Commission’s regulations to include associated persons of SDs and MSPs, and Regulation 23.22, which incorporated the prohibition set forth in CEA section 4s(b)(6). With respect to SDs or MSPs, Regulation 1.3(aa)(6) provides that the term “associated person” means any natural person who is associated with an SD or MSP as a partner, officer, employee, agent (or any natural person occupying a similar status or performing similar functions), in any capacity that involves the solicitation or acceptance of swaps (other than in a clerical or ministerial capacity); or the supervision of any person or persons so engaged. The exclusion in Regulation 1.3(aa)(6) from the definition of associated person of an SD or MSP for persons who act in a clerical or

³ See 77 FR 2613 (Jan. 19, 2012).

⁴ 17 CFR 1.3(aa)(6). The Commission’s regulations also can be accessed through the Commission’s Web site.

ministerial capacity is consistent with the definition (and exclusion for clerical or ministerial activity) in the other provisions in Regulation 1.3(aa) that define the term “associated person” in the context of other Commission registrants.⁵

B. The Proposal

Regulation 23.22, by its terms, applies to an associated person of an SD or MSP as defined in section 1a(4) of the Act and Regulation 1.3(aa). Because Regulation 1.3(aa)(6) contains a general exclusion from the associated person definition for a person employed in a clerical or ministerial capacity, and the exclusion in CEA section 1a(4) must be read in conjunction with CEA section 4s(b)(6), in November 2012 the National Futures Association (NFA)⁶ recommended that the Commission clarify that the prohibition in CEA section 4s(b)(6) does not bar association with an SD or MSP by employees who are employed in a clerical or ministerial capacity.

In light of NFA’s recommendation, and in accordance with the language in CEA section 4s(b)(6) that qualifies the Prohibition (“Except to the extent otherwise specifically provided by rule, regulation, or order”), the Commission proposed to amend paragraph (a) of Regulation 23.22 (“Proposal”)⁷ to clarify that the Prohibition does not apply to an individual employed by an SD or MSP in a clerical or ministerial capacity.⁸

⁵ See also CEA Section 4k(1), which excludes from associated person registration a person who, in a clerical or ministerial capacity, solicits or accept customer orders for a futures commission merchant or an introducing broker.

⁶ Letter from Thomas W. Sexton, Senior Vice President and General Counsel, NFA, to Gary Barnett, Director of the Division of Swap Dealer and Intermediary Oversight, dated November 12, 2012. NFA is a registered futures association (and the sole association so registered) under CEA Section 17.

⁷ 78 FR 20848 (Apr. 8, 2013).

⁸ In this regard, the Commission noted in the Proposal that pursuant to the authority granted it in CEA section 4s(b)(6), it had previously adopted an exception from the Prohibition for a person already listed as a principal of, or already registered as an associated person of, another Commission registrant, notwithstanding a statutory disqualification. See Regulation 23.22(b), proviso.

II. Comments on the Proposal

The Commission received one comment letter on the Proposal. It stated that adoption of the Proposal would “reduce regulatory burden and reduce the costs of determining whether a clerical or ministerial employee is statutorily disqualified” and, further, that “[t]he Proposed rule is reasonable and will improve regulatory efficiency.”⁹

III. The Final Regulation

In light of the foregoing, the Commission is adopting as proposed an amendment to paragraph (a) of Regulation 23.22 to clarify that the Prohibition does not apply to an individual employed by an SD or MSP in a clerical or ministerial capacity.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)¹⁰ requires federal agencies, in promulgating regulations, to consider whether those regulations will have a significant economic impact on small entities and, if so, to provide a regulatory flexibility analysis respecting the impact.¹¹ The Commission previously has determined that SDs and MSPs are not “small entities” for RFA purposes.¹² Moreover, adoption of the amendment to Regulation 23.22(a) as proposed will not have a significant economic impact on any person who will be affected thereby, because it will not impose any additional operational requirements or otherwise direct or confine the activities of affected persons.

The Commission did not receive any comments regarding its RFA analysis in the Proposal. Accordingly, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the

⁹ Comment letter from Chris Barnard at page 1 (June 3, 2013).

¹⁰ 5 U.S.C. 601 et seq. (2006).

¹¹ By its terms, the RFA does not apply to “individuals.” See 48 FR 14933, 14954 n. 115 (Apr. 6, 1983).

¹² See 77 FR 2613, 2620 (Jan. 19, 2012).

Commission, hereby certifies that the regulation being published in this Federal Register release will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)¹³ imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The regulation being published in this Federal Register release clarifies that the Prohibition does not apply where the person in question is employed in a clerical or ministerial capacity. As discussed in the Proposal, the amendment will not impose a “burden” or “collection of information” as those terms are defined in the PRA.¹⁴

The Commission did not receive any comments regarding its PRA analysis in the Proposal. Accordingly, for purposes of the PRA, the Chairman, on behalf of the Commission, certifies that the regulation being published in this Federal Register release will not impose any new reporting or recordkeeping requirements.

C. Cost-Benefit Considerations

CEA section 15(a) requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The

¹³ 44 U.S.C. 3501 et seq.

¹⁴ 78 FR 20848, 20849 (Apr. 8, 2013).

Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

As is explained above, the amendment to Regulation 23.22(a) makes a clarifying change to the text of one of the Commission's regulations adopted to reflect changes made to the CEA by the Dodd-Frank Act, by specifying that the prohibition against an SD or MSP permitting a statutorily disqualified person to associate with it does not include a person employed in a clerical or ministerial capacity.

Costs. With respect to costs, the Commission believes that adoption of the amendment to Regulation 23.22(a) will not impose any costs. This is because the amendment clarifies that an SD or MSP need not consider whether CEA section 4s(b)(6) applies to employees performing clerical or ministerial duties. Thus the Commission does not believe that any new costs will be imposed.

Benefits. With respect to benefits, as discussed in the Proposal, the Commission believes that the amendment to Regulation 23.22(a) will benefit SDs and MSPs by reducing the search costs associated with determining whether a clerical or ministerial employee is statutorily disqualified. This, in turn, mitigates the existing cost of compliance with CEA section 4s(b)(6). As such, it is an "other public interest consideration" under CEA section 15(a), referred to above.

Public Comment. The Commission invited public comment on its cost-benefit considerations, but no such comments were received.

List of Subjects in 17 CFR Part 23

Associated persons, Commodity futures, Major swap participants, Ministerial or clerical employees, Registration, Statutory disqualification, Swap dealers, Swaps.

For the reasons presented above, the Commodity Futures Trading Commission hereby amends 17 CFR part 23 as follows:

PART 23 – SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b-1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, and 21.

2. Amend §23.22 by revising the section heading and paragraph (a) to read as follows:

§23.22 Prohibition against statutory disqualification in the case of an associated person of a swap dealer or major swap participant.

(a) Definition. For purposes of this section, the term “person” means an “associated person of a swap dealer or major swap participant” as defined in section 1a(4) of the Act and §1.3(aa)(6) of this chapter, but does not include an individual employed in a clerical or ministerial capacity.

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Issued in Washington, DC, on October 22, 2013, by the Commission.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

**Appendix to Swap Dealers and Major Swap Participants; Clerical or Ministerial
Employees – Commission Voting Summary**

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O’Malia, and
Wetjen voted in the affirmative; no Commissioner voted in the negative.

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10/28/2013]